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No. 14-840, 14-841

IN THE SUPREME COURT OF THE UNITED STATES

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

ELECTRIC POWER SUPPLY ASSOCIATION, *et al.*,
Respondents.

ENERNOC, Inc., *et al.*
Petitioners,

v.

ELECTRIC POWER SUPPLY ASSOCIATION, *et al.*,
Respondents.

BRIEF OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE *AMICUS*[1]

The Court's decision in this case will resolve jurisdictional issues that directly impact the interests and authority of the *amicus curiae* herein. The issue before the Court is whether demand response programs are within the jurisdictional scope of the Federal Power Act (FPA), which expressly limits federal jurisdiction to sales of electric energy at wholesale in interstate commerce. As a state utility regulatory commission interested in demand response as a way of addressing electrical system loads, the *amicus* is directly impacted by this decision.

The *amicus* is the Public Service Commission of the State of New York ("NYPSC"), which is a state administrative commission created under the New York Public Service Law. The NYPSC has general regulatory jurisdiction over electric utilities and the provision of retail electric service within the State of New York. The NYPSC is responsible, inter alia, for ensuring that every electric corporation furnishes and provides "such service, instrumentalities and

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[1] No other person than the Public Service Commission of the State of New York ("NYPSC") or its counsel authored this brief or provided financial support for it. "No motion for leave to file an *amicus curiae* brief is necessary" as this brief is being submitted pursuant to Supreme Court Rule 37.4 "on behalf of a city, county, town, or similar entity...by its authorized law officer." This brief supports the position of Respondents. The views expressed herein are not intended to represent those of any individual member of the NYPSC. Pursuant to the New York Public Service Law §12, the Chair is authorized to direct this filing on behalf of the NYPSC.

facilities as shall be safe and adequate and in all respects just and reasonable." N.Y. Pub. Serv. L. §65(1) (McKinney's 2011). It is the duty of NYPSC counsel to represent and appear for the people of the State of New York and the Commission in all actions and proceedings involving any question under the Public Service Law or within the jurisdiction of the Commission. N.Y. Pub. Serv. L. §12 (McKinney's 2011).

Additionally, the State of New York is within a single wholesale electricity market managed by the New York Independent System Operator ("NYISO"). The NYPSC is the only state public utility commission within the NYISO footprint. Therefore, within the NYISO, NYPSC is uniquely positioned to represent the interests of the people of the State of New York in matters concerning electric utility regulation.

SUMMARY

The United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") apparently does not dispute that the Federal Energy Regulatory Commission ("FERC") was well-intentioned when it established federal incentives encouraging end-users to engage in demand response programs. The D.C. Circuit concluded, however, that FERC lacks jurisdiction to regulate demand response programs through incentives or otherwise. *Electric Power Supply Ass'n v. FERC*, 753 F.3d 216, 221, 223 (D.C. Cir. 2014). Though demand response affects wholesale electric markets,

that impact would not fall within the jurisdictional limits that the Federal Power Act imposes on FERC regulation if the D.C. Circuit is affirmed.

This Court should recognize that even if FERC cannot directly regulate demand response, it can still allow adjustments to the prices set in its jurisdictional installed electric capacity markets to reflect demand response. Installed electric capacity requirements are essentially forecasts of peak electrical demand increased by a margin held in reserve to ensure electric system reliability. Electric utilities serving retail customers and other energy service companies ("load serving entities") participating in wholesale markets must be prepared to meet such forecast electric peak demand estimates by procuring adequate supplies of electric capacity. *Electricity Consumers Resource Council v. FERC*, 407 F.3d 1232, 1234 (D.C. Cir. 2005).

Under D.C. Circuit precedent, FERC can adjust such capacity requirements to reflect the reductions in demand that result from energy efficiency and other demand management programs supervised by the States without exercising direct jurisdiction over demand response. *Connecticut Dept. of Public Utilities v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009). Such FERC adjustments to wholesale electric capacity requirements would definitely not intrude upon the States' jurisdiction over this feature of retail electric supply. These FERC adjustments will enable States, in turn, to direct their jurisdictional utilities serving retail load to compensate participants in demand reduction

programs. In this manner, any FERC jurisdictional limitations would be respected without obstructing realization of the benefits States intend to obtain through their demand response incentive programs. State programs would adequately compensate demand response providers at the retail level, where the response actually occurs, while electric utilities would be able to recognize the load reductions in meeting their wholesale electric capacity market obligations. Further, if upheld, the D.C. Circuit decision will have the salutary effect of preventing any FERC disruption of state demand response programs, by restricting FERC to recognition of the effects of such programs on wholesale costs and loads.

ARGUMENT

D.C. Circuit Precedent Supports FERC Authority to Recognize State-Jurisdictional Demand Response Programs in Setting Rates, Even If FERC Cannot Regulate Demand Response

FERC has endeavored to use demand response to improve the functioning and competitiveness of wholesale electric power markets. *Demand Response in Organized Wholesale Energy Markets*, Order No. 745, 134 FERC ¶ 61,187 at 7-8 (March 15, 2011) ("Order 745"). Demand response can reduce the need for dispatch of high-priced generators during times of peak demand, thus reducing the average price of electricity. *Id.* at 8. It can also place downward pressure on generator bidding strategies by increasing the risk that a

generator will not be dispatched if it bids too high during periods of peak demand. *Id.* Further, demand response offers system engineers a useful tool for balancing generation and load on the power grid. *Id.* at 8-9.

The United States Court of Appeals for the D.C. Circuit has, however, held that demand response is not a wholesale sale, but is instead a commitment not to consume electricity, not subject to FERC jurisdiction. *Electric Power Supply Ass'n v. FERC*, 753 F.3d 216, at 223 ("Demand response—simply put— is part of the retail market. It involves retail customers, their decision whether to purchase at retail, and the levels of retail electricity consumption.")

Affirming the D.C. Circuit's jurisdictional holding, however, does not defeat the forward progress of valuable demand response initiatives. FERC's encouragement of demand response "focused only on organized wholesale energy markets, not capacity markets." Order 745 at 67.[2] Even if the D.C. Circuit is upheld, FERC, in cooperation with the States, can exercise its jurisdiction over wholesale electric capacity markets in a way that would meaningfully and significantly assist the States in exercising their retail jurisdiction to

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[2] "'Capacity' is not electricity itself but the ability to produce it when necessary. It amounts to a kind of call option that electricity transmitters purchase from parties–generally, generators–who can either produce more or consume less when required." *Connecticut Dept. of Public Utilities v. FERC*, 569 F.3d at 479.

promote demand response. Such an exercise would fully respect the FPA-established jurisdictional boundary between wholesale and retail electric ratemaking, as applied by D.C. Circuit decisions.

Specifically, FERC can foster demand response by adjusting wholesale electric "installed capacity" requirements for each regional transmission organization (RTO) or Independent System Operator (ISO) in a manner that would account for electric demand reductions brought about through State-supervised retail demand response programs. Installed electric capacity requirements are essentially estimates of peak demand, reflecting a reserve margin; FERC employs them to determine how much "installed capacity," that is, available electricity supply, "load serving entities," that is, retail electric utilities, must purchase in order to ensure reliability of the wholesale electric grid. *Connecticut Dept. of Public Utilities v. FERC*, 569 F.3d at 479, 481.[3] The RTOs and ISOs supervising electric wholesale markets would then reflect FERC adjustments to reduce the capacity-purchasing requirements that they impose upon retail electric utilities within their control areas.

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[3] The penultimate and most proximate buyers of capacity (before the consumers who ultimately shoulder the costs in their utility bills) are called 'load serving entities' or LSEs – the public utilities that deliver electricity to end users. The goal is for LSEs to purchase sufficient capacity to easily meet expected peaks in electricity demand on their transmission systems. *Id.* at 479.

States, in turn, can and should direct those retail electric utilities to compensate demand response providers when cost savings are experienced through the reduced electric capacity requirements attributable to the retail consumers that participate in demand response. FERC recognized that individual States are already pursuing demand response efforts. Order 745 at 7. Thus, even if the D.C. Circuit is affirmed, FERC and the States can take actions in their respective jurisdictional domains, over wholesale and retail rates, to encourage demand response. In particular, States can ensure that demand response providers would be adequately compensated for the value of their services by load serving entities.

FERC acknowledgment of the contribution of State-regulated demand response to meeting installed capacity obligations would not transgress any FPA jurisdictional boundary between wholesale and retail sales. As the D.C. Circuit recognized, FERC authority over wholesale markets allows review and adjustment of installed capacity requirements that RTOs impose upon "load serving entities." *Electric Power Supply Ass'n v. FERC*, 753 F.3d at 222, distinguishing *Connecticut Dept. of Public Utilities*, 569 F.3d at 479. In setting wholesale electric rates FERC "consideration of the relationship between jurisdictional and non-jurisdictional rate structures is commonplace." *Federal Power Comm'n v. Conway Corp.*, 426 U.S. 271, 280 (1976).

This Court has established the principle that, under the substantially identical Natural Gas Act,[4] FERC may account for activities it cannot regulate in establishing parameters and rates for activities that it can regulate. *Federal Power Comm'n v. United States Gas Pipeline Co.*, 386 U.S. 237, 245 (1967) (the Commission "has the power to reduce cost of service, and hence rates, based on the application of non-jurisdictional losses to jurisdictional income"); *Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581, 603 (1945) (although the Commission could not regulate the production and gathering of natural gas, it could recognize such expenses in setting rates); *Panhandle Eastern Pipe Line Co. v. Federal Power Comm'n*, 324 U.S. 635, 646 (1945) (while the Commission "lacks authority to fix rates for direct industrial sales, [it] may take those rates into consideration when it fixes" jurisdictional rates); *cf. Rochester Gas & Elec. Corp. v. Public Service Comm'n*, 754 F.2d 99, 103 (2d Cir. 1985) (relying upon the above-cited cases in holding that a State utility commission may take federally-regulated wholesale sales revenues into account when setting state-jurisdictional retail rates).

Consequently, FERC may, in setting installed capacity requirements (a function within is wholesale ratemaking powers), allow the reduction of the RTOs' installed capacity requirements to

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[4] 15 U.S.C. §717 *et seq; Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (holding that the relevant provisions of the FPA and the Natural Gas Act "are in all material respects substantially identical").

account for peak demand reductions created by a State's demand response programs. At least two methods are available for accomplishing the accounting. First, the "load-serving entity" arranging to meet its wholesale installed capacity obligation could be allowed to treat the demand response it acquires at retail as self-supply for purposes of meeting its installed capacity obligations. *See New England Power Generators Ass'n v. FERC*, 757 F.3d 283, 290 (D.C. Cir. 2014) (observing that self-supplied resources impact "the price of capacity [which] is indisputably a matter within the Commission's exclusive jurisdiction..."). [5] The amount of demand response acquired would then count towards achieving compliance with the capacity procurement obligation. Second, the demand response could be treated as a load modifier. The amount of demand response would be subtracted from the peak load forecast, and thus reduce the installed capacity obligation. *Connecticut Dept. of Public Utilities*, 569 F.3d at 483-84.

Both methods fall well within FERC's authority to recognize non-jurisdictional events when setting jurisdictional rates. They properly recognize the benefits "load-serving entities" create

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[5] While FERC can recognize self-supply for purposes of setting wholesale electric capacity prices, it cannot assert direct regulatory authority over retail self-supply. *Southern California Edison Co. v. FERC*, 603 F.3d 996, 1001 (D.C. Cir. 2010) (rejecting FERC reliance on *Connecticut Dept. of Public Utilities* as a basis for jurisdiction to decide that a retail sale had not taken place). Similarly, FERC cannot assert jurisdiction over demand response even though it can reflect the impacts of demand response in setting wholesale rates.

by acquiring demand response, and avoid the double count that would occur if a "load-serving entity" were to incur costs in purchasing demand response at retail while also being forced to purchase supply to meet an unadjusted installed capacity obligation at wholesale.

Such action on FERC's part would further Congress' stated policy goal of removing "unnecessary barriers to demand response participation in energy, capacity and ancillary service markets." Energy Policy Act of 2005, Pub. L. No. 109-58, §1252(f), 119 Stat. 594, 966 (2005). It would do so by enabling retail electric utilities to reduce their installed capacity expenditures to meet their obligations as "load serving entities," consonant with the reality that demand response reduces peak demand. Those cost savings could then be used by the States in devising compensation programs directed toward participants in demand response programs, thereby creating appropriate incentives for participation in those programs.

Moreover, FERC recognition of these non-jurisdictional effects of state demand response programs in setting FERC jurisdictional rates would avoid unwarranted FERC disruption of the compensation programs States create for the purpose of encouraging participation in demand response. FERC, in the guise of supervising wholesale markets, recently attempted such an unjustified intrusion into New York's programs, in granting a Petition for Rehearing on demand response program issues, notwithstanding that it

had allowed the Petition to sit fallow for nearly five years. Docket No. EL07-39, et al., New York Independent System Operator, Inc., Order on Clarification, Rehearing, and Compliance Filing, 150 FERC ¶61,208 (issued March 19, 2015). FERC reversed its 2010 decision concerning an offer floor when demand response resources are bid into installed capacity markets, in which it had respected New York's authority to offer incentives to demand response resource providers. In 2015, FERC announced that it would instead require offer floors calculated in a way that could have prevented the providers from realizing the benefit of the incentives. In so intruding upon the State's ability to offer those incentives, FERC could have thwarted New York's efforts to promote demand response.

Once FERC properly restricts itself to only recognizing the effects of non-jurisdictional demand response activities when it sets the rates in the wholesale markets over which it does have jurisdiction, it will lack the means to engage in such mischief. [6] Debates over the proper pricing of demand response resources in wholesale markets, such as the matter the D.C. Circuit addressed in the decision below, will also be avoided. Instead, States will be free to offer the incentives to demand response resources they believe will appropriately value those resources, while FERC reflects the impacts of any resources that are obtained in setting

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[6] The harm was avoided when offer floor tariffs other than those FERC addressed were invoked so as to result in an offer floor calculation that, in effect, permitted the providers to retain the incentives.

wholesale rates. This proper division of responsibility between FERC and the States will therefore result in the promotion of demand response resources in accordance with the jurisdictional separation of responsibilities that Congress intended in enacting the FPA.

CONCLUSION

For the foregoing reasons, if the Court affirms the decision of the United States Court of Appeals for the District of Columbia Circuit, it should clarify that Petitioner Federal Energy Regulatory Commission may still respect state jurisdiction over demand response by allowing Independent System Operators and Retail Transmission Organizations operating wholesale electric capacity markets to account for the results of States' demand reduction efforts in establishing installed capacity requirements.

Respectfully submitted,

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